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# The Five Stages of LGBTQ Discrimination and its Effects on Mass Incarceration

Michael D. Braunstein

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# The Five Stages of LGBTQ Discrimination and its Effects on Mass Incarceration

Michael D. Braunstein\*

*Although the Supreme Court’s recent decision in Obergefell v. Hodges provided some indication of equality for members of the LGBTQ community, the sad truth is that discrimination against those who do not identify as “heterosexual” reaches far deeper than the right to marry. This discrimination is especially present with regards to biased treatment by law enforcement officers and a lack of accommodations or protections within the court and prison systems. In a nation that has seen various groups of people fight for and earn their equality over and over again, it is truly concerning that the LGBTQ community is still being punished simply for being different. This article delves deeper into some of the historical and present problems facing members of the LGBTQ community with specific regards to the unethical and discriminatory treatment within the criminal justice system. The article then suggests guidelines that should be put into place to ensure the equal treatment of LGBTQ citizens by law enforcement and to offer protections within the court and prison systems.*

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## I. INTRODUCTION

Decades after the start of the movement against lesbian, gay, transgendered, bisexual, and queer (“LGBTQ”) discrimination,<sup>1</sup> LGBTQ citizens have finally earned a long-sought victory. In its recent decision on June 26, 2015, the Supreme Court ruled in a 5-to-4 decision that the Constitution guarantees a right to same-sex marriage.<sup>2</sup> Although this was undoubtedly a huge win for the LGBTQ community, the question still remains: “how, if at all, will this decision affect the larger problems with LGTBQ discrimination?” As further explained below, the answer to this question may not be as apparent as the *Obergefell* decision suggests.

Although seldom reported in the news, LGBTQ discrimination by police officers has been a significant problem for members of the LGBTQ community.<sup>3</sup> This discrimination has been present for quite some time, perhaps most obviously when looking at the enactment and selective enforcement of certain laws, such as anti-sodomy laws and “crime against

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<sup>1</sup> Elizabeth A. Harris & Adriane Quinlan, *Where the Fight Began, Cries of Joy and Talk of Weddings*, N.Y. TIMES, June 25, 2011, at A3 (“Crowds gathered, screamed and embraced in Sheridan Square near the Stonewall Inn, where the gay-rights movement began more than 40 years ago.”).

<sup>2</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

<sup>3</sup> JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE 47 (2011) [hereinafter QUEER (IN)JUSTICE] (noting that recent statistics show that “law enforcement officers were the third largest category of perpetrators of anti-LGBT violence”).

nature” statutes.<sup>4</sup> For example, even though the Supreme Court ruled that anti-sodomy laws were invalid in *Lawrence v. Texas*,<sup>5</sup> in reality, this decision has not had as far-reaching effects as would be expected.<sup>6</sup> Further, the obscure wording of some statutes allows for selective enforcement. Some vaguely worded crimes can lead to unexpected arrests.<sup>7</sup>

The discrimination against LGBTQ persons does not stop with police officers, but also continues within the courts and in the prisons.<sup>8</sup> Some of the most egregious examples of LGBT discrimination within the courts can come not only from the judge and jury, but from a person’s own attorney.<sup>9</sup> Surveys have shown that, even in our progressive, modern era, some people will not trust others simply because of their sexuality.<sup>10</sup> In the prison system, looking beyond the obvious problems associated with rape,<sup>11</sup> prisoners who are perceived to be gay or gender non-conforming are punished for consensual sex with another inmate and even some non-sexual behavior.<sup>12</sup> Being a transgendered inmate also poses the problems of a heightened risk of sexual assault and limited access to gender-affirming medical care.<sup>13</sup>

## II. MASS INCARCERATION

The United States is statistically a highly-incarcerated country.<sup>14</sup> Specifically, with only five percent of the world’s population,

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<sup>4</sup> See e.g., Phil Willon, *Chief Quits Over Gay Sex Sting*, L.A. TIMES, Jan. 11, 2011, at AA1.

<sup>5</sup> 539 U.S. 558, 578 (2003).

<sup>6</sup> See *Id.* (“The present case does not involve minors. It does not involve persons who might be injured or coerced or are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.”); see also M. Blake Huffman, *North Carolina Courts: Legislating Compulsory Heterosexuality by Creating New Crimes Under the Crime Against Nature Statute Post-Lawrence v. Texas*, 20 LAW & SEXUALITY 1 (2011).

<sup>7</sup> QUEER (IN)JUSTICE, *supra* note 3, at 61.

<sup>8</sup> Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141 (2007).

<sup>9</sup> See *id.*; Todd Brower, *Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in California Courts*, 11 AM. U. J. GENDER SOC. POL’Y & L. 39 (2002); see also Sarah Valentine, *When Your Attorney Is Your Enemy: Preliminary Thoughts on Ensuring Effective Representation for Queer Youth*, 19 COLUM. J. GENDER & L. 773 (2010).

<sup>10</sup> See, e.g., QUEER (IN)JUSTICE, *supra* note 3, at 75 (noting that, in one such instance, jury members found a witness unreliable merely because he was gay).

<sup>11</sup> For more detailed examples of the problems associated with rape, see *infra* Section III.B.

<sup>12</sup> *Id.* at 97.

<sup>13</sup> *Id.* at 110-17.

<sup>14</sup> See Roy Walmsley, *World Population List*, INT’L CTR. FOR PRISON STUDIES (2011), [http://www.apcca.org/uploads/9th\\_Edition\\_2011.pdf](http://www.apcca.org/uploads/9th_Edition_2011.pdf).

the United States accounts for roughly twenty-five percent of the world's incarceration.<sup>15</sup> The phenomenon of incarcerating a high percentage of the nation's population has been coined by scholars as "mass incarceration."<sup>16</sup> Over the past several decades, the rate of imprisonment within the United States has risen dramatically.<sup>17</sup> Since the 1980s, the amount of people incarcerated in the United States has more than quadrupled.<sup>18</sup> That being said, the term "mass incarceration" is misleading in that not everyone involved in and affected by the criminal justice system is ultimately incarcerated.<sup>19</sup> Recent statistics show that, when including those serving probation and those on parole, the actual number of persons involved with the criminal justice system are even more staggering—there are over 6.8 million persons currently supervised by the U.S. adult correctional systems.<sup>20</sup>

The use of the term "incarceration" in the phrase "mass incarceration" suggests that this phenomenon is only represented by those actually confined within the prison system. However, as more fully discussed herein, collateral consequences of being involved with the legal system can often generate the most significant effects on a person's life.<sup>21</sup> Merely escaping incarceration hardly means that a person who has become targeted by, or otherwise involved in, the criminal justice system is not subject to other legal and social consequences as a result.<sup>22</sup> This is equally, if not especially, true for non-heterosexual persons.<sup>23</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *See, e.g.*, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (2007); Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (2006).

<sup>17</sup> *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1803 (2012).

<sup>18</sup> *See* Danielle Kaeble, Lauren Glaze, Anastasios Tsoutis, and Todd Minton, *Correctional Populations in the United States, 2014*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST. (January 21, 2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf>; *Criminal Justice Facts*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/criminal-justice-facts/> (last visited Sept., 9, 2016) (noting that incarceration rates have increased 500% in the last 40 years).

<sup>19</sup> *See id.*

<sup>20</sup> *Id.*, table 1.

<sup>21</sup> *See, e.g.*, Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) ("Despite their innocuous name, for many convicted offenders, and especially those who never serve any prison time, these 'collateral' consequences are the most persistent punishments that are inflicted for [their] crime.")

<sup>22</sup> *See, e.g., id.*

<sup>23</sup> For a discussion on the effects of discriminatory interactions between LGBTQ persons and the legal system, *see infra* Section III.C.

### III. THE FIVE STAGES OF LGBTQ DISCRIMINATION

#### A. *Stage 1: Denial - The Refusal to Recognize the Rights of LGBTQ Persons*

The Gay Rights Movement has been fighting for equality for decades.<sup>24</sup> The modern movement is historically noted as beginning with the 1969 revolt against police harassment by gay and transgender citizens near the Stonewall Inn.<sup>25</sup> This rebellion gave birth to a movement that would seek equal treatment for the largest group of people since the passage of the Thirteenth and Nineteenth Amendments to the U.S. Constitution.<sup>26</sup> Prior to 1961, every state in the U.S. had anti-sodomy laws.<sup>27</sup> In 2003, however, with the decision in *Lawrence v. Texas*, it appeared that the LGBTQ community had finally had its first big win.<sup>28</sup>

In *Lawrence*, an anonymous call was placed to police regarding a weapons disturbance at an apartment building.<sup>29</sup> When the police arrived, they entered the apartment and found Lawrence and another man having consensual homosexual sex.<sup>30</sup> Lawrence and his partner were arrested and convicted for engaging in “deviate sexual intercourse,” which was defined as anal or oral sex between members of the same sex.<sup>31</sup> This law was controversial even before the decision in *Lawrence* because it was clearly targeting the conduct of homosexuals. In fact, before *Lawrence*, the same statute had been declared unconstitutional on multiple occasions by the Texas Court of Appeals.<sup>32</sup> In its 2003 decision, the U.S. Supreme Court

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<sup>24</sup> Elizabeth A. Harris & Adriane Quinlan, *Where the Fight Began, Cries of Joy and Talk of Weddings*, N.Y. TIMES, June 25, 2011, at A3 (“Crowds gathered, screamed and embraced in Sheridan Square near the Stonewall Inn, where the gay-rights movement began more than 40 years ago.”).

<sup>25</sup> *Id.*; see also Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589, 592 (2001).

<sup>26</sup> U.S. CONST. amend 13 (abolishing slavery and involuntary servitude); U.S. CONST. amend 19 (granting women’s suffrage).

<sup>27</sup> See *Supreme Court Strikes Down Texas Law Banning Sodomy*, N.Y. TIMES (June 26, 2003) [www.nytimes.com/2003/06/26/politics/26WIRE-SODO.html](http://www.nytimes.com/2003/06/26/politics/26WIRE-SODO.html); see also *Getting Rid of Sodomy Laws: History and Strategy that Led to the Lawrence Decision*, ACLU (June 16, 2013) <https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision> (noting that Illinois became the first state to repeal its anti-sodomy laws in 1961).

<sup>28</sup> 539 U.S. 558 (2003).

<sup>29</sup> *Id.* at 562.

<sup>30</sup> *Id.* at 562-63.

<sup>31</sup> *Id.* at 563 (quoting Tex. Penal Code Ann. § 21.06(a) (2003)).

<sup>32</sup> See *City of Dallas v. England*, 846 S.W.2d 957 (Tex. App.—Austin 1993); *State v. Morales*, 826 S.W.2d 201 (Tex. App.—Austin 1992).

ruled the Texas sodomy statute to be unconstitutional once and for all.<sup>33</sup> Unfortunately, what looked to be a huge victory in the way of LGBTQ rights, did not have the far-reaching effects that members of the Gay Rights Movement had hoped for and discrimination in the form of legislation targeted at LGBTQ persons still exists.<sup>34</sup>

Once again, in 2015, members of the LGBTQ community received another long sought after victory in the form of a decision declaring the prohibition of same-sex marriage unconstitutional.<sup>35</sup> Alas, despite progress being made in terms of non-discriminatory legislation, the issues associated with LGBTQ discrimination are still prevalent throughout our society. As we have seen with the movement for other purposes such as race equality and gender equality, the process of destigmatizing a group of oppressed people does not occur instantaneously with the repeal of less than friendly legislation.<sup>36</sup> With regards to LGBTQ discrimination, the process can be expected to be equally slow-moving, if not more so. For instance, despite the ruling in *Obergefell*, a same-sex couple was refused a marriage license by a county clerk in Kentucky shortly after the Supreme Court's decision.<sup>37</sup>

Most currently, issues have arisen from state enactment of laws which ban transgender individuals from using restrooms appropriate for the gender identities. One such law, enacted in North Carolina has been dubbed the "most anti-LGBT law in the U.S."<sup>38</sup> In response to such actions by the states, the President issued an order on May 13, 2016 directing public schools to allow transgender students to use the bathrooms

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<sup>33</sup> *Lawrence*, 539 U.S. at 579.

<sup>34</sup> In fact, twelve states still have anti-sodomy laws enacted. *See, e.g.*, Fla. Stat. § 800.02 (2015).

<sup>35</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

<sup>36</sup> Even still today, decades after the enactment of the 13<sup>th</sup> and 19<sup>th</sup> amendments, there are still many instances of discrimination based on gender and race across the nation.

<sup>37</sup> *See Kentucky Clerk Still Won't Issue Same-Sex Marriage Licenses*, FOX NEWS (September 1, 2015), <http://www.foxnews.com/politics/2015/09/01/will-clerk-issue-gay-marriage-licenses-after-court-ruling.html>; *but see* Mariano Castillo and Kevin Conlon, *Kim Davis Stands Ground, But Same-Sex Couple Get Marriage License*, CNN (September 14, 2015), <http://www.cnn.com/2015/09/14/politics/kim-davis-same-sex-marriage-kentucky/> (noting that the couple was ultimately permitted to marry).

<sup>38</sup> *See* Judy Woodruff, *How North Carolina Signed a Bill Dubbed the Most Anti-LGBT Law in the U.S.*, PUBLIC BROADCASTING SERVICE (March 24, 2016), <http://www.pbs.org/newshour/bb/how-north-carolina-signed-a-bill-dubbed-the-most-anti-lgbt-law-in-the-u-s/>; *see also* Tal Kopan and Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN (March 24, 2016), <http://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/>. In response to North Carolina, the governor of New York banned "all non-essential state travel" to North Carolina. *See* N.Y. Exec. Order No. 155 (March 28, 2016), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_155\\_0.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_155_0.pdf).

matching their gender identity.<sup>39</sup> However, society's reluctance to change and to accept LGBTQ members as equals, free from discrimination, has continued through numerous states refusing to follow the Presidential order and courts blocking the equality-promoting policy from taking effect.<sup>40</sup>

On a more localized level, as more fully discussed below, discrimination of LGBTQ persons by the police, within the court system, and within prison continue to be a source of anguish for LGBTQ members of society.

## B. *Stage 2: Anger - The Current State of LGBTQ Discrimination Throughout the Criminal Justice Process*

### 1. Police Discrimination

Aside from discriminatory legislation,<sup>41</sup> discrimination of LGBTQ persons within the criminal justice system begins with interactions with the police. In everyday law enforcement, police frequently target LGBTQ persons for certain crimes, especially "vice" crimes, which include prostitution, lewd conduct, and indecent exposure. For these types of crimes, police and prosecutors retain a great deal of discretion in determining whether and when to arrest and prosecute. Due to the improper use of this discretion, LGBTQ sex workers, transgender women, and LGBTQ youth are particularly punished.<sup>42</sup> Further, because

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<sup>39</sup> See Emanuella Grinberg, *Feds Issue Guidance on Transgender Access to School Bathrooms*, CNN (May 14, 2016), <http://www.cnn.com/2016/05/12/politics/transgender-bathrooms-obama-administration/>.

<sup>40</sup> See Moriah Balingit, *Another 10 States Sue Obama Administration Over Bathroom Guidance for Transgender Students*, WASH. POST (July 8, 2016), [https://www.washingtonpost.com/local/education/another-10-states-sue-obama-administration-over-bathroom-guidance-for-transgender-students/2016/07/08/a930238e-4533-11e6-88d0-6adee48be8bc\\_story.html](https://www.washingtonpost.com/local/education/another-10-states-sue-obama-administration-over-bathroom-guidance-for-transgender-students/2016/07/08/a930238e-4533-11e6-88d0-6adee48be8bc_story.html); see also Ariane de Vogue, *Judge Temporarily Blocks Obama School Transgender Bathroom Policy*, CNN (August 22, 2016), <http://www.cnn.com/2016/08/22/politics/transgender-school-bathroom-policy/> (noting that a federal judge issued a nationwide injunction barring federal agencies from taking action against school districts for failing to follow Obama's May 13 order).

<sup>41</sup> See *supra* Section III.A.

<sup>42</sup> QUEER (IN)JUSTICE, *supra* note 3, at 53 (noting that LGBTQ people "are among the most visible targets of sex policing"). This is likely due to public disgust with the idea of being "queer." See e.g., Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1, 12-31 (2008); Bernard E. Harcourt, *Foreword: "You Are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-)Queers*, 94 J. CRIM. L. & CRIMINOLOGY 503, 509-10 (2004); Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1658-59 (2004); MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY 167-203 (2010) (describing how the use of disgust as a



transgender women are frequently perceived to be sex workers by police, the vague nature of crimes such as “solicitation to commit prostitution”<sup>43</sup> can lead to arrests for “walking while trans.”<sup>44</sup> In and of itself, gender nonconformity can be used by police to indicate an intention to solicit prostitution even when there are no corroborating factors present.<sup>45</sup>

Overall, LGBTQ defendants are more likely to be arrested and prosecuted for certain offenses than straight defendants.<sup>46</sup> In one such instance of LGBTQ profiling, in 2014 a lesbian woman was a passenger in a car that was leaving a well-known LGBT center.<sup>47</sup> A police officer began following the vehicle from the time it left the center until it turned into a nearby gas station.<sup>48</sup> Once the car had been turned off, the officer turned on the overhead lights and approached the vehicle.<sup>49</sup> During the interaction, the officer repeatedly referred to the passenger as a “white male” mockingly even though she was a mixed race woman and asked the driver, “How can you be gay if you have kids?”<sup>50</sup> The officer then cited the passenger for failure to wear a seatbelt even though she had removed it after the vehicle was already stopped at the gas station.<sup>51</sup> During the arrest, the officer slammed the passenger into the ground, chipped her tooth, and handcuffed her so tightly that her wrists were bruised.<sup>52</sup> Once arrested, a male officer refused to allow a female officer to search her and instead pulled up her shirt and down her pants to conduct the search himself.<sup>53</sup> While being held in the station, police officers reportedly laughed at her and took photos with their cellphone while she cried in the

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reaction to same-sex sexual activities leads to increased enforcement of statutes that criminalize public sex).

<sup>43</sup> For example, in Florida it is a crime for any person to “engage[] in open and gross lewdness and lascivious behavior.” Fla. Stat. § 798.02; *see also* Fla. Stat. § 796.07 (entitled “Prohibiting prostitution and related acts”).

<sup>44</sup> QUEER (IN)JUSTICE, *supra* note 3, at 61 (describing how the term “walking while trans” is derivative of the more commonly used term “driving while black” and reflects the reality that transgender women often cannot walk down the street without being stopped, harassed, verbally, sexually, and physically abused, and arrested, regardless of what they are doing at the time).

<sup>45</sup> *Id.* at 62 (noting how hailing a cab or carrying more than one condom makes it “an open and shut case”).

<sup>46</sup> *Id.* at 77-78 (noting instances where a heterosexual defendant in the same situation would likely not have gone to court).

<sup>47</sup> Complaint, *Wagoner v. City of Portland*, No. 14-CV-17648, 2014 WL 6478959 (Or. Cir. Ct. Nov. 18, 2014).

<sup>48</sup> *Id.* at \*2.

<sup>49</sup> *Id.* at \*3.

<sup>50</sup> *Id.* at \*3-4.

<sup>51</sup> *Id.* at \*4.

<sup>52</sup> *Id.* at \*5.

<sup>53</sup> *Id.*

holding cell.<sup>54</sup> Another highly-publicized example of this bias can be seen in “gay sex stings,”<sup>55</sup> including one conducted in Palm Springs, California, which is described as “the gayest city in America.”<sup>56</sup> The police chief who was in charge at the time directed the operation to target a neighborhood known for “gay cruising.”<sup>57</sup> Upon arrest, the police chief referred to the suspects as “filthy” and told the arresting officer “[y]ou guys should get paid extra for this.”<sup>58</sup>

The unequal treatment of LGBTQ persons does not end with unfair and often unwarranted arrests but continues throughout the police encounters. In fact, in terms of violence against LGBTQ victims, law enforcement officers make up the third largest category of perpetrators.<sup>59</sup> In a recent report focused on anti-LGBT violence, many respondents reported that they had experienced verbal abuse, physical abuse, and sexual violence perpetrated by police officers.<sup>60</sup> Additionally, police officers accounted for twenty-three percent of all offenders who were unknown to the victim.<sup>61</sup> This type of inadequate police response and misconduct includes examples of LGBTQ persons being humiliated,<sup>62</sup>

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<sup>54</sup> *Id.* at \*6.

<sup>55</sup> See Jordan Blair Woods, *Don't Tap, Don't Stare, and Keep Your Hands to Yourself! Critiquing the Legality of Gay Sting Operations*, 12 J. GENDER RACE & JUST. 545 (2009).

<sup>56</sup> See, e.g., Phil Willon, *Chief Quits Over Gay Sex Sting*, L.A. TIMES, Jan. 11, 2011, at AA1.

<sup>57</sup> *Id.*

<sup>58</sup> *Palm Springs Police Chief Apologizes for Calling Gays “Filthy Mother F--,”* LGBTQ NATION (Dec. 29, 2010), <http://www.lgbtqnation.com/2010/12/palm-springs-police-chief-apologizes-for-calling-gays-filthy-mother-f/>. The police chief resigned once his remarks became public.

<sup>59</sup> QUEER (IN)JUSTICE, *supra* note 3, at 47.

<sup>60</sup> Nat'l Col. of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV Infected Hate Violence in 2012*, at 39 (2013), [http://www.avp.org/storage.documents/ncavp\\_2012\\_hvreport\\_final.pdf](http://www.avp.org/storage.documents/ncavp_2012_hvreport_final.pdf).

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., Maria Cramer, *Transgender Woman Settles Lawsuit with Boston over Treatment During 2010 Arrest*, BOSTON.COM, (Feb. 5, 2013), <http://archive.boston.com/news/local/massachusetts/2013/02/05/transgender-woman-settles-lawsuit-with-boston-over-treatment-during-arrest/jldg4ZWazhEU5srQSiYANI/story.html>. During this incident, a transgender woman was arrested for using the women's restroom at the homeless shelter where she was living. After being taken to the police station, the officers forced her to remove her shirt and bra and jump up and down to humiliate and laugh at her. See also Chamonix A. Porter, *Twenty-Eight Hours: Transgender People, Police Brutality, and State Violence*, BROAD RECOGNITION (Mar. 13, 2012), <http://www.broadrecognition.com/politics/twenty-eight-hours-transgender-people-police-brutality-and-state-violence/>.

beaten,<sup>63</sup> and even raped by officers.<sup>64</sup> Some of the most extreme examples of this type of police misconduct have even resulted in the death of the LGBTQ person they were summoned to help.<sup>65</sup> For example, in 2013, police were called to assist a mentally ill transgender woman.<sup>66</sup> Despite their knowledge of her mental illness, instead of conducting a mental health evaluation, they instead sought out arrest warrants in the woman's name.<sup>67</sup> The officers proceeded to arrest the woman and, in the course of doing so, six officers piled on top of her, both worsening her mental health emergency and ultimately resulting in her death.<sup>68</sup> Throughout the encounter, the officers not only took actions that worsened the situation but also referred to the woman as "it," instead of "she" or "her."<sup>69</sup>

Not only are LGBTQ defendants often treated unfairly by police, but statistics show that LGBTQ victims of crimes are also less likely to be treated fairly than straight victims.<sup>70</sup> Because of this, research shows that many LGBTQ victims are not likely to report crimes to the police in fear that the police will be unsympathetic to their situation.<sup>71</sup> Perhaps even worse, is the lack of response to same-sex rape situations.<sup>72</sup> In a significant development on this point, in recent years the FBI has expanded its definition of rape to include same-sex rape.<sup>73</sup> In certain circumstances LGBTQ victims who have chosen to report various crimes to the police

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<sup>63</sup> See, e.g., *3 Men Accuse NYPD Officers of Bias Attack in Bed-Stuy*, NEWS 12 BROOKLYN (June 11, 2013), <http://brooklyn.news12.com/news/3-gay-men-accuse-nypd-officers-of-bias-attack-in-bed-stuy-1.5461203>; see also Kat Long, *Two Lesbians Assault in Brooklyn*, N.Y. BLADE, June 12, 2009, <http://alp.org/node/366>.

<sup>64</sup> See, e.g., *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.*, AMNESTY INTERNATIONAL 40 (2005), <https://www.amnesty.org/en/documents/AMR51/122/2005/en/>.

<sup>65</sup> Second Amended Complaint for Damages, *Moore ex rel. Moore v. City of Berkeley*, No. 3:14-CV-00669-CRB, 2014 WL 5449240, at \*5 (N.D. Cal. Oct. 10, 2014).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at \*5-6.

<sup>68</sup> *Id.* at \*7-8.

<sup>69</sup> *Id.* at \*8.

<sup>70</sup> *Protected and Served?*, LAMBDA LEGAL, <http://www.lambdalegal.org/protected-and-served/police> (last visited August 10, 2016) (describing a survey finding that seventy-one percent of LGBTQ respondents felt that their complaints to the police were not fully addressed).

<sup>71</sup> *Id.* (noting that twenty-one percent of respondents reported encountering hostile attitudes from officers, fourteen percent reported verbal assault from officers, three percent reported sexual harassment, and two percent reported physical assault).

<sup>72</sup> Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011).

<sup>73</sup> See Charlie Savage, *U.S. to Expand Its Definition of Rape in Statistics*, N.Y. TIMES, Jan. 7, 2012, at A11; see also Roni Caryn Rabin, *Men Struggle for Rape Awareness*, N.Y. TIMES, Jan. 23, 2012, at D1.

have been mocked by dispatchers and have even been met with an outright refusal to take action on their behalf.<sup>74</sup>

## 2. Discrimination in the Courts

As mentioned above, one of the most obvious forms of LGBTQ discrimination within the court system is the selective prosecution of “vice” crimes. For example, despite the decision in *Lawrence v. Texas*, sodomy laws are still enforced all around the country.<sup>75</sup> In fact, twelve states around the country—specifically, Alabama, Florida, Idaho, Kansas, Louisiana, Michigan, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, and Utah—still have anti-sodomy laws,<sup>76</sup> and these laws are still used to arrest LGBTQ persons to this day.<sup>77</sup> Even though some of these laws are worded very vaguely,<sup>78</sup> they can and are construed by the courts in a way that negatively affects LGBTQ persons.<sup>79</sup> However, the fact that a victim may be gender non-conforming can also lead to sentencing bias in favor of non-LGBTQ offenders.<sup>80</sup>

Several studies have concluded that the majority of gay and lesbian defendants experienced courthouses as hostile and threatening

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<sup>74</sup> QUEER (IN)JUSTICE, *supra* note 3, at 130 (noting situations that include dispatchers and officers mocking and laughing at victims of crimes, refusing to take photographs of a victim’s injuries, telling victims that it is their fault that they were victimized because they were transgender); *see also* Kristina B. Wolff & Carrie L. Cokely, “To Protect and Serve?”: An Exploration of Police Conduct in Relation to the Gay, Lesbian, Bisexual, and Transgender Community, 11 *SEXUALITY & CULTURE* 1, 13 (2007).

<sup>75</sup> *See* J. Kelly Strader, *Lawrence’s Criminal Law*, 16 *BERKELEY J. CRIM. L.* 41 (2001) (describing courts’ resistance to the underlying philosophy of the *Lawrence* decision).

<sup>76</sup> *See* 12 states still ban sodomy a decade after court ruling, USA TODAY (Apr. 21, 2014), <http://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025/>.

<sup>77</sup> *See* Julie Compton, *American Men Are Still Being Arrested for Sodomy*, ADVOCATE.COM (May 23, 2016), <http://www.advocate.com/crime/2016/5/23/american-men-are-still-being-arrested-sodomy>.

<sup>78</sup> *See e.g.*, Fla. Stat. § 800.02 (2015) (“A person who commits any unnatural and lascivious act with another person commits a misdemeanor of the second degree . . .”). Although vague, this, and similar statutes in other states, tend to target gay men due to the requirement that the act be committed “with another person.”

<sup>79</sup> *See* Conforti v. State, 800 So.2d 350 (Fla. 4th DCA 2001) (finding that the defendant did not violate statute proscribing unnatural and lascivious acts by his masturbating in a vehicle while undercover police officer stood outside and watched because the statute required that the conduct occur “with another person” and the defendant performed the act by himself). This type of language allows the courts to target gay offenders committing what some may consider “unnatural and lascivious” acts with each other.

<sup>80</sup> *See, e.g.*, Darren Lenard Hutchinson, *Dissecting Axes of Subordination: The Need for a Structural Analysis*, 11 *AM. U. J. GENDER SOC. POL’Y & L.* 13, 13-14 (2003) (describing a judge who imposed a lenient sentence on a defendant who murdered two gay men, specifically because the victims were gay).

environments.<sup>81</sup> Although many times this atmosphere is the result of intentional and overt actions and statements made by the various people involved in a legal proceeding,<sup>82</sup> sometimes even legal advocates with good intentions can make unfortunate mistakes that discriminate against their clients based on a lack of knowledge or understanding of the wants or needs of a gender-nonconforming person.<sup>83</sup>

Further, discrimination of LGBTQ persons within the court system can perhaps most clearly be seen through the insensitive language used by judges and prosecutors, jury members, and even the person's own attorney.<sup>84</sup> For example, in one homicide case, the prosecutor described the defendant to the jury as a "hard-core" lesbian and based the entire theory of the case on the fact that murdering the victim was a "natural response" for a lesbian.<sup>85</sup> The prosecutors admitted that their "primary theory" was proving that the defendant committed the murder primarily because she is a lesbian.<sup>86</sup> In support of this theory, prosecutors called ten witnesses before the jury to testify that the defendant was a lesbian, read the titles of homosexuality-related books which were taken from her home,

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<sup>81</sup> See, e.g., Brower, *supra* note 8 (describing studies of gays' experiences in the courts of New Jersey, California, and the United Kingdom); Todd Brower, *Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in California Courts*, 11 AM. U. J. GENDER SOC. POL'Y & L. 39 (2002); Michael B. Shortnacy, Comment, *Guilt and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309 (2001).

<sup>82</sup> See, e.g., Dean Spade, *Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANSGENDER RIGHTS 228 (Paisley Currah et al., eds. 2006) (discussing how gender-nonconforming people "consistently report experiencing extreme disrespect when attempting to access legal services, having their cases rejected or ignored by the agencies they turn to, and feeling so unwelcome and humiliated that they often do not return for legal services").

<sup>83</sup> See *id.*, at 228 n.43 (describing a situation where a well-intentioned attorney prevented a judge from sentencing her two transgender women clients to a women's drug treatment facility because the lawyer was under the misapprehension that this was somehow improper, and had failed to discuss gender identity and safety in sex-segregated programs with her clients); see also Valentine, *supra* note 9, at 777 ("Perhaps more insidious than overt prejudice is the assumption that everyone is, or should be, heterosexual. Such presumptions are the basis for decisions that harm queers, not because of hostility but because they are rendered invisible to the court or to the state.").

<sup>84</sup> See, e.g., Brower, *supra* note 8, at 169 (citing Dominic J. Brewer & Maryann Jacobi Gray, *Sexual Orientation Fairness in California Courts* (2000), <http://www.courts.ca.gov/documents/report.pdf>).

<sup>85</sup> QUEER (IN)JUSTICE, *supra* note 3, at 83 (citing a hearing transcript from *People v. Mata*, No. 98-CF-110 (Cir. Ct. Boone County, Ill. Oct. 7, 1999)).

<sup>86</sup> *Id.*; see also Joey L. Mogul, *The Dykier, the Butcher, the Better: The State's Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. CITY L. REV. 473, 473 n.2 (2005).

and referenced the defendant's sexuality at least seventeen times in their arguments before the jury.<sup>87</sup>

In a death penalty case in which the defendant was convicted of killing his lover, the prosecutor argued for the death penalty on the grounds that "sending a homosexual to the penitentiary certainly isn't a very bad punishment," insinuating that sending a gay man to prison would be a "pleasurable reward" and the only true punishment for such a person would be death.<sup>88</sup> In yet another example, a nineteen-year-old transgender male was arrested and charged with sexual assault once police discovered that he was born a female even though the four "victims"—all teenage girls—had initially admitted that the encounters were all consensual when they believed he was anatomically male.<sup>89</sup>

In terms of discrimination by jury members, surveys have shown that thirty percent of LGBTQ witnesses in cases believed that those who knew their sexual orientation did not treat them with respect and thirty-nine percent believed their sexual orientation was used to devalue their credibility,<sup>90</sup> and based on survey responses, these beliefs are justified. For example, one respondent to a California survey on LGBTQ people in courts stated that "jury members suggested that a witness was gay and therefore his testimony could not be trusted."<sup>91</sup> In another instance, a gay respondent stated that he "was discredited as a witness because they said [he] was probably 'out at a club or something' before [he] witnessed the accident."<sup>92</sup> In order to leverage this stigmatization in their favor, some litigants in civil cases, and their attorneys and witnesses, used disparaging remarks to turn the jury against their LGBTQ adversary.<sup>93</sup> Perhaps most frightening, is discrimination by an LGBTQ defendant's own attorney.<sup>94</sup>

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<sup>87</sup> See Mogul, *supra* note 86, at 485.

<sup>88</sup> QUEER (IN)JUSTICE, *supra* note 3, at 89.

<sup>89</sup> *Id.* at 77-78 The defendant received 3 months in jail in a women's prison and was forced to register as a sex offender even though had he been anatomically a male the case would probably never had gone to court and, at worst, would have been prosecuted as a misdemeanor.

<sup>90</sup> See Brower, *supra* note 8, at 168-69.

<sup>91</sup> QUEER (IN)JUSTICE, *supra* note 3, at 75.

<sup>92</sup> *Id.*

<sup>93</sup> See, e.g., NEW JERSEY SUPREME COURT, FINAL REPORT OF THE TASK FORCE ON SEXUAL ORIENTATION *Issues* 26, 29, 40-41 (2001), [www.judiciary.state.nj.us/task-force/index.htm](http://www.judiciary.state.nj.us/task-force/index.htm) (noting that 79 percent of gay and lesbian respondents reported observing offensive gestures, disparaging remarks, or offensive jokes, 45 percent of gay and lesbian respondents said they observed litigants or witnesses being treated disadvantageously because they were perceived to be gay or lesbian. In one such case "a lawyer, his client, and several witnesses used the other litigants' homosexuality to assert both the defendants and witnesses were alcoholic and sexually promiscuous and predatory.").

<sup>94</sup> Valentine, *supra* note 9, at 777 (describing how most states encourage and may even require attorneys representing children to be loyal to the court and not to their clients, and

In some situations, such as those involved with guardian *ad litem* or “best interest” attorneys, the court may even have the ability to refuse substitution of counsel where the assigned attorney refuses to advocate for the client’s position.<sup>95</sup> One such example involves the placement of a sixteen-year-old transgender girl named Destiny who was placed in a high-security juvenile facility for boys.<sup>96</sup> Shortly after being placed in the facility, Destiny was sexually assaulted and attacked, which continued throughout the first six months in the facility.<sup>97</sup> Because her court-appointed attorney refused to address these concerns or assist his client, another attorney was forced to file reports documenting the assaults.<sup>98</sup> When directed to appear at the hearing, the court-appointed attorney not only refused to support Destiny’s wishes to be moved to another facility, but went so far as to warn the court against granting the request and stated: “I think this young man has a lot of things—and I use the word man—to think about so I would just ask the court to be cautious in any decision that it makes.”<sup>99</sup>

Because of the great discretion retained by the court in many types of crimes, queer youth are more likely to be detained pretrial than straight youth and queer defendants convicted of sex offenses receive harsher sentences than their straight counterparts.<sup>100</sup>

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how this allows lawyers to ignore ethical rules and allows them to directly undermine their clients before the court).

<sup>95</sup> See *In re Amika P.*, 684 N.Y.S.2d 761 (N.Y. Fam. Ct. 1999) (refusing child’s request to remove law guardian who refuses to advocate for the child’s position); see also Martin Guggenheim, *A Law Guardian By Any Other Name: A Critique of the Report of the Matrimonial Commission*, 27 PACE L. REV. 785, 825-28 (2007) (describing cases in which courts have refused to allow him to substitute as the attorney for the child where children have objected to the position taken by their assigned counsel).

<sup>96</sup> Jody Marksamer, *And By the Way, Do you Know He Thinks He’s a Girl? The Failures of Law, Policy, and Legal Representation for Transgender Youth in Juvenile Delinquency Courts*, 5 SEXUALITY RES. & SOC. POLICY 72, 76 (2008).

<sup>97</sup> *Id.* at 77.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 77-78 (also noting that the first time the court-appointed attorney was contacted he “said with a chuckle and a hint of disgust, ‘and by the way, do you know he thinks he’s a girl.’”).

<sup>100</sup> QUEER (IN)JUSTICE, *supra* note 3, at 77-78; see also Caitlyn Silhan, *The Present Case Does Involve Minors: An Overview of the Discriminatory Effects of Romeo and Juliet Provisions and Sentencing Practices on Lesbian, Gay, Bisexual, and Transgender Youth*, 20 LAW & SEXUALITY 97 (2011) (describing how “Romeo and Juliet” exceptions to statutory rape provisions often apply only to opposite-sex couples, resulting in long prison sentences and sex offender registration for LGBTQ youth who participate in the same conduct as their straight counterparts).

### 3. Discrimination within Prisons

Over the years, society has developed a stigmatization of prisons as “queer spaces” due to their nature of being sex-segregated facilities, where the only options for sexual expression are necessarily homosexual in nature.<sup>101</sup> This view is not new,<sup>102</sup> nor is it necessarily unsupported.<sup>103</sup> While there are undoubtedly examples of consensual homosexual encounters within prisons, discrimination becomes apparent when looking at the cases of nonconsensual sexual activity. Take, for example, the well-publicized case of Roderick Johnson.<sup>104</sup> Johnson was an African American gay male who was sentenced to eighteen months in prison for possession of cocaine while on probation for a non-violent burglary.<sup>105</sup> Johnson was initially placed in “safekeeping”<sup>106</sup> housing due to his effeminate manner and sexual orientation, but was eventually placed in general population.<sup>107</sup> Not long after Johnson entered the prison, a gang claimed ownership over him and Johnson was beaten and raped frequently.<sup>108</sup>

During the time this was happening, Johnson continued to seek help from guards, asked for medical treatment, and even filed numerous “life endangerment forms.”<sup>109</sup> Many times Johnson sought help, he would receive responses that suggested that Johnson should not mind the abuse

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<sup>101</sup> QUEER (IN)JUSTICE, *supra* note 3, at 95.

<sup>102</sup> See Elizabeth Stoker Bruenig, *Why Americans Don't Care About Prison Rape*, THE NATION (Mar. 2, 2015), <https://www.thenation.com/article/why-americans-dont-care-about-prison-rape/> (noting that pop culture, such as movies, advances society's understanding that, when people go to prison, they get raped).

<sup>103</sup> See Emily Albrink Hartigan, *Just Talking with the Furniture*, 13 J. GENDER RACE & JUST. 615, 638 (2010) (noting that many inmates are “gay for the stay,” a term used to describe otherwise heterosexual inmates who engage in homosexual activities only while incarcerated).

<sup>104</sup> Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004).

<sup>105</sup> *Id.* at 512.

<sup>106</sup> This housing status was used to “separate vulnerable individuals from more aggressive offenders.” *Id.* An inmate is designated for safekeeping when he “is at risk of victimization, has enemies in the population, has a history of homosexuality, or possesses other characteristics that mark the offender as vulnerable to predation.” *Id.*

<sup>107</sup> *Id.* The prison officers assigning his housing referred to Johnson as a “punk,” which was prison slang for a homosexual man. *Id.*

<sup>108</sup> *Id.* (according to Johnson's affidavit, Johnson was forced to be a sort of sexual servant and was rented out to other inmates to perform sexual favors). When asked at trial about Johnson, a former high-ranking prison gang member testified that Johnson was not considered a member of the gang but rather was considered the gang's “property.” See Adam Liptak, *Inmate Was Considered “Property” of Gang, Witness Tells Jury in Prison Rape Lawsuit*, N.Y. TIMES, Sept. 25, 2005, at A14.

<sup>109</sup> *Johnson*, 385 F.3d at 513. Even though Johnson was moved to different buildings several times, each time he was moved a new gang would claim ownership over him and his nightmarish situation continued.



because he was gay.<sup>110</sup> The violent attacks on Johnson continued up until he was able to contact the American Civil Liberties Union (“ACLU”), at which point he was finally transferred back to “safekeeping” and the attacks stopped.<sup>111</sup>

Unfortunately, Johnson’s experience as a homosexual inmate is not a unique one. Although prison rape rates are notoriously difficult to determine,<sup>112</sup> a 2011-12 study by the Bureau of Justice Statistics found that the inmates with the highest rates of sexual victimization are those who identify as gay, lesbian, bisexual, or other.<sup>113</sup> Due—likely in large part—to the negative stigma of appearing weak in prison and the threat of retaliation by inmates committing the sexual assaults, male victims of prison rape often choose not to report their victimization to prison authorities or counselors.<sup>114</sup> Because of this, victims of prison rape rarely have access to safe spaces. Even when a prison attempts to provide a safe space for LGBTQ sexual assault victims, the results are less than ideal. For instance, the Los Angeles County Jail has set up a system to segregate gay and transgender inmates, which it claims is to protect them from sexual assault, known as the “K6G unit.”<sup>115</sup>

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<sup>110</sup> See *id.* (“[T]he comments allegedly made by [prison officers] . . . include statements such as: ‘You need to get down there and fight or get you a man,’ ‘There’s no reason why Black punks can’t fight and survive in general population if they don’t want to f\*\*\*,’ and remarks to the effect that, since Johnson was homosexual, he probably liked the sexual assaults he was experiencing.”).

<sup>111</sup> After being transferred, Johnson filed a § 1983 civil claim against fifteen Texas Department of Criminal Justice employees alleging, *inter alia*, that Johnson was denied equal protection out of anti-homosexual animus by prison officials. *Id.* at 514. Despite the plethora of evidence Johnson presented concerning the rapes, a Texas jury ruled in favor of the prison officials and Johnson’s claims were dismissed. See *Johnson v. Doe*, 2013 WL 3816727, at \*1 (S.D. Tex. July 22, 2013). This case was a second § 1983 claim by Johnson after being incarcerated and sexually assaulted again. This second case was also dismissed with prejudice by the Southern District of Texas upon the defendants’ motion for summary judgment. On appeal, the Fifth Circuit affirmed in a per curiam decision. See *Johnson v. Doe*, 582 Fed.Appx. 512 (5th Cir. 2014).

<sup>112</sup> See, e.g., Helen M. Eigenberg, *The National Crime Survey and Rape: The Case of the Missing Question*, 7 JUST. Q. 655 (1990).

<sup>113</sup> See ALLEN J. BECK ET AL., U.S. DEP’T OF JUST., BUREAU OF JUST. STATISTICS SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12, at 30-31 (2013). The results of the survey show that non-heterosexual males are at least 10 times more likely to be subject to sexual victimization than their heterosexual counterpart. Additionally, the survey shows that non-heterosexual victims are at least twice as likely to be subjected to sexual victimization by prison staff members. *Id.*

<sup>114</sup> See Chandra Bozelko, *Why We Let Prison Rape Go On*, N.Y. TIMES (Apr. 17, 2015), <http://www.nytimes.com/2015/04/18/opinion/why-we-let-prison-rape-go-on.html> (noting that even with the enactment of the Prison Rape Elimination Act in 2003, as of 2015 only two states are in full compliance).

<sup>115</sup> Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race and Incarceration*, 99 CAL. L. REV. 1309, 1320 (2011).

Although the institution of the K6G unit has been celebrated, the operational realities of it can sometimes defeat its purpose.<sup>116</sup> First, the jail conducts a “screening process” where they ask the inmate about his sexual orientation.<sup>117</sup> If the inmate does not “come out as gay” to the officer conducting the screening, they are automatically ineligible for K6G.<sup>118</sup> This can pose a problem because the screening often occurs in a public area where fellow inmates are able to hear the inmate’s response.<sup>119</sup> Not only is there a fear of what other inmates might do or say, but there have also been instances of verbal harassment by jail officials.<sup>120</sup> If an inmate identifies as gay despite this, he is then subject to intense questioning by straight, white prison officials about his “gay lifestyle.”<sup>121</sup> These questions typically involve gay culture, gay terminology, and “coming out experiences.”<sup>122</sup> For example, the officers may “ask the inmates to describe the annual gay pride parade that takes place in West Hollywood,” may ask them to “[d]efine ‘glory hole,’ or ask how their parents reacted when they ‘came out.’”<sup>123</sup> If the officers are satisfied with the inmate’s answers, they will ask the inmate to provide what are effectively “gay references”—people who can vouch for the inmate being gay.<sup>124</sup>

Further problems arise when it comes to transgender inmates because they are often assigned based solely on their outward physical appearance.<sup>125</sup> The jail officials often look for things such as “breast development or other overly feminine markers” to determine if they are subjectively transgender.<sup>126</sup> Additionally, bisexual inmates are also excluded from K6G housing sometimes based solely on the officials’ “intuition.”<sup>127</sup>

The institution of such a screening process is inherently discriminatory in the way that it characterizes certain people simply by their outward

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1322. The author references the fact that an inmate who is non-heterosexual may not be likely to volunteer that information in fear of repercussions. The author further notes that this can lead to confusion among transgender inmates because the question posed asks only about sexuality and not gender identity. Accordingly, the lack of context as to why the jail is inquiring can lead to inmates who should rightfully be in the K6G unit, being sent to general population instead.

<sup>118</sup> *Id.* at 1322-23.

<sup>119</sup> *Id.* at 1323.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1324-25.

<sup>122</sup> *Id.* at 1325.

<sup>123</sup> *Id.* at 1326.

<sup>124</sup> *Id.* at 1327.

<sup>125</sup> *Id.* (noting that the jail does not allow transgender inmates who do not “readily appear” transgender the opportunity to come out as such).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1329.

appearance and attempts to challenge someone's sexual orientation. This process, based solely on a set of potentially irrelevant questions designed by straight, white prison officials, does little more than test if the inmate's expression of their chosen sexuality conforms with the officials' preconceived notions of where a gay person should go, what they should do, and how they should be.

The above does not even come close to being an exhaustive list of the different ways in which LGBTQ persons are discriminated against within the prison system. For example, there are cases where transgender women are deprived of basic necessities such as bras, which are necessary for some of these women for obvious reasons.<sup>128</sup> In addition, although some inmates can have "gender identity disorder,"<sup>129</sup> which is commonly treated with hormone therapy, inmates requiring such treatment can be denied adequate healthcare by prison officers seeking either to punish those inmates or due to a lack of understanding of what a gender nonconforming person is.<sup>130</sup> Further, while in prison, LGBTQ inmates are not just subject to the high risk of rape, as noted above, but can also be punished for engaging in consensual homosexual activities.<sup>131</sup> Although Congress has taken some efforts to reduce some of the issues plaguing LGBTQ prisoners, such as the enactment of the Prison Rape Elimination Act of 2003 ("PREA"),<sup>132</sup> efforts have not been taken to address the overarching issue which stems from a misunderstanding of LGBTQ persons. So long as society remains—sometimes willfully—ignorant of this group of members of our society, no amount of training or enactment of legislation will serve its intended purpose.

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<sup>128</sup> See, e.g., Tali Woodward, *Life in Hell: In California Prisons an Unconventional Gender Identity Can Be Like an Added Sentence*, SAN FRANCISCO BAY GUARDIAN (Mar. 21, 2006).

<sup>129</sup> Gender identity disorder requires a diagnosis by a licensed physician. See, e.g., *Farmer v. Hawk-Sawyer*, 69 F. Supp. 2d 120, 122 (D.D.C. 1999) (citing the Bureau of Prisons policy on transgender prisoners).

<sup>130</sup> See *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 167 (D. Mass. 2002); see also *O'Donnabhain v. C.I.R.*, 134 T.C. 34, 35 (2010).

<sup>131</sup> See D. Morgan Bassichis, *It's War in Here: A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons*, SYLVIA RIVERA LAW PROJECT 33 (2007), [www.slrp.org/files/warinhere.pdf](http://www.slrp.org/files/warinhere.pdf) (noting that some guards will call a transgender inmate "it" and will punish them for merely hugging another prisoner because they assume they are violating the rules regarding homosexual contact).

<sup>132</sup> Notably, the PREA has not been very successful in "eliminating" prison rape. See U.S. DEP'T OF JUST., OFFICE OF JUST. PROGRAMS PREA DATA COLLECTION ACTIVITIES, 2015 (2015), [www.bjs.gov/content/pub/pdf/pdca15.pdf](http://www.bjs.gov/content/pub/pdf/pdca15.pdf) (showing that the number of reported sexual victimization cases has risen significantly year over year).

C. *Stage 3: Depression - The Effects of Discrimination on the LGBTQ Community*

Discrimination of LGBTQ persons can have lasting effects. This is evident on both local and nationwide bases. For individuals, discrimination can take the form of bullying, which can, in turn, result in bullying-induced suicides.<sup>133</sup> Recent studies have shown that LGBTQ youth are more likely to be victims of violence compared to their heterosexual peers.<sup>134</sup> Such bullying is not always violent in nature, but can also take the form of teasing or harassment.<sup>135</sup> While verbal harassment may not seem as bad as physical violence on its face, it is still one of the many factors that contribute to bullying-induced suicides of LGBTQ persons. This epidemic of bullying leads to LGBTQ students being more than twice as likely to commit or attempt to commit suicide than their heterosexual counterparts.<sup>136</sup>

As analyzed above, bullying does not merely come from the public but from the criminal justice system itself. “[S]tate sponsored violence is seldom named and prosecuted as criminal, though it may involve killing large numbers of people, torture, massive theft, and use of sexual violence.”<sup>137</sup> The types of discriminatory police practices in arrests and prosecutions are themselves a form of violence against LGBTQ people.<sup>138</sup> Despite the notion that LGBTQ discrimination has diminished since the

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<sup>133</sup> It is worth noting that accounts of white victims of LGBTQ bullying are often more highly publicized than that of minority LGBTQ victims. Compare, for example, the amount of attention paid to the suicides of Tyler Clementi and Carl Walker-Hoover. See Richard Pérez-Peña & Nate Schweber, *Roommate Is Arraigned in Rutgers Suicide Case*, N.Y. TIMES, May 24, 2011, at A22 (describing the highly-publicized suicide of Rutgers University student Tyler Clementi that resulted from the taping and public posting of Clementi’s sexual encounter with another man); Chris Rohmann, *Stage Struck: Pesticide for Bullies*, VALLEY ADVOC. (May 20, 2010), <http://www.valleyadvocate.com/article.cfm?aid=11785> (describing the suicide of eleven-year-old African-American Springfield student Carl Walker-Hoover, who was bullied because he was perceived to be gay, and whose tragic death “provoked far less media attention and community soul-searching than” the highly-publicized suicide of Phoebe Prince, who was taunted because of an opposite-sex love triangle). For a more detailed discussion of this racial disparity see *infra* Section III.D.

<sup>134</sup> See Tumaini R. Coker et al., *The Health and Health Care of Lesbian, Gay, and Bisexual Adolescent*, 31 ANN. REV. OF PUB. HEALTH 457, 466 (2010).

<sup>135</sup> See *LGBT Youth*, CENTER FOR DISEASE CONTROL AND PREVENTION, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HEALTH, <http://www.cdc.gov/lgbthealth/youth.htm> (last visited Sept. 9, 2016).

<sup>136</sup> Stephen T. Russell & Kara Joyner, *Adolescent Sexual Orientation and Suicide Risk: Evidence from a National Study*, 91 AM. J. OF PUB. HEALTH 1276, 1278 (2001).

<sup>137</sup> QUEER (IN)JUSTICE, *supra* note 3, at xvi.

<sup>138</sup> See *infra* Section III.B.

start of the gay rights movement,<sup>139</sup> LGBTQ discrimination within the legal system is still an operational reality that is faced by many people every day. For example, the continued existence and utilization of certain statutes to police LGBTQ-related activities, such as homosexual sex, can be tragic for those targeted. When recounts of people arrested for engaging in homosexual activity become public, the resulting public shaming can lead to suicide.

Take, for example, the story of a high school student, Marcus Wayman.<sup>140</sup> Marcus was sitting in a vehicle with another male and drinking when the two were approached by the police.<sup>141</sup> During questioning, the boys were told to empty their pockets, and the officers discovered that the young men had condoms on them.<sup>142</sup> The officers concluded, perhaps erroneously, that they boys were going to engage in sexual intercourse.<sup>143</sup> The boys were arrested for underage drinking and brought to the police station for further questioning. While there, the police lectured the boys on the biblical prohibition against homosexuality and threatened to inform Marcus' grandfather that Marcus was gay.<sup>144</sup> After hearing this threat, Marcus told his friend that he was going to kill himself.<sup>145</sup> Unfortunately, later that night, Marcus did just that and took his own life.<sup>146</sup>

The very real possibility of being “outed,” as exemplified in the case of Marcus Wayman, can result in LGBTQ defendants being too afraid of media exposure to even present a defense on their behalf.<sup>147</sup> Because of this, it has been noted by one activist that:

Officers are often able to act, secure in the knowledge that their behavior will not be investigated thoroughly or indeed at all . . . .M]any individuals charged under morals regulations may not challenge an

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<sup>139</sup> See, e.g., David Alan Sklansky, “One Train May Hide Another”: *Katz*, *Stonewall*, and the Secret Subtext of *Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 880, 932 (2008) (arguing that privacy protections were shaped by 1960s “anxieties” about “homosexuality and its policing,” such as “peepholes and undercover decoys in public lavatories,” and concluding that “[g]ay men and lesbians can still face police harassment, but far less than they used to face”).

<sup>140</sup> *Sterling v. Borough of Minersville*, 232 F.3d 190, 192 (3d Cir. 2000).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (noting that account differed as to whether the boys actually planned to engage in sexual intercourse).

<sup>144</sup> *Id.* at 192-93.

<sup>145</sup> *Id.* at 193.

<sup>146</sup> *Id.* This ordeal, resulting in his untimely death, prompted Marcus' mother to file a lawsuit under 18 U.S.C. § 1983 against the officers, the police department, and the city. The lawsuit was based upon allegations that the officers deprived Marcus of his constitutional right to privacy by threatening to disclose his sexual identity.

<sup>147</sup> See *Stonewalled*, *supra* note 63, at 40-41.

officer's version of events, questionable entrapment techniques or abuse and are therefore silenced out of fear of their sexual orientation being revealed, public embarrassment, loss of employment or immigration repercussions. Furthermore, many of those arrested are unable to afford the costs of mounting a defense. This exacerbates the climate of impunity. As a result, individuals may be wrongfully convicted of a criminal offense, carrying potentially significant consequences.<sup>148</sup>

Among these potential consequences is the possibility of becoming labeled as a sex-offender.<sup>149</sup> A person can be forced to register as a sex-offender for "such minor and victimless crimes as consensual adult sodomy and gay solicitation."<sup>150</sup> This label alone can have dire social, economic, and physical consequences on an individual, and can become a sort of "self-fulfilling prophecy" that contributes to the vicious cycle of anti-LGBTQ policing and incarceration.<sup>151</sup>

#### D. Stage 4: Acceptance - A Beacon of Hope

Despite the continued discrimination of LGBTQ persons within the criminal justice system and within society as described above, there have been some changes to our legal system throughout the past few decades—and especially recently—that seem to show progress in the way of substantive rights for LGBTQ persons and the beginning notions of equality. For example, the decision in *Lawrence v. Texas*, despite its caveats, was undeniably a win for the LGBTQ community.<sup>152</sup> Since *Lawrence*, both the courts and the legislature has taken additional steps to move towards the preservation and protection of LGBTQ rights. Such actions include the enactment of the Matthew Shepard and James Byrd Jr. Hate Crime Prevention Act of 2009 ("Hate Crime Prevention Act")<sup>153</sup> and the aforementioned recent Supreme Court decision in *Obergefell v. Hodges*<sup>154</sup> finding a constitutional right to marry for LGBTQ persons.

Even these positive steps are not immune to pitfalls and prejudice, and we as a society still have a long way to go to achieve a more inclusive

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<sup>148</sup> *Id.* at 41. It is also noted, however, that some jurisdictions are taking steps to prevent the media from being alerted from when such arrests are being made.

<sup>149</sup> See, e.g., Robert L. Jacobson, "Megan's Laws" Reinforcing Old Patterns of Anti-Gay Police Harassment, 87 GEO. L.J. 2431 (1999) (noting that the sex offender registry "was created in large part as a tool to harass gay men").

<sup>150</sup> *Id.* at 2432.

<sup>151</sup> See Carla Schultz, *The Stigmatization of Individuals Convicted of Sex Offenses: Labeling Theory and the Sex Offender Registry*, 2 THEMIS: RESEARCH J. OF JUST. STUDIES AND FORENSIC SCIENCE 64, 64 (2014).

<sup>152</sup> For a more complete discussion of the *Lawrence* decision and the evolution of anti-sodomy laws, see *supra* Section III.A

<sup>153</sup> 18 U.S.C. § 249 (2009).

<sup>154</sup> 135 S.Ct. 2584 (2015).

community resembling equality. For example, although the Gay Rights movement is intended to promote equality and empower all LGBTQ members of society, the movement has historically tended to focus its attention on the rights of homosexual white males.<sup>155</sup> Some scholars have argued that this is because it is more understandable for the heterosexual public to understand and empathize with the members of the LGBTQ community who look most similar to themselves.<sup>156</sup> Further, the focus on heterosexual white males is not just a tactic used to get a favorable response from the public, but some LGBTQ rights-related organizations and activists tend to focus their political agendas on obtaining rights specifically tailored to white and upper-class LGBTQ persons.<sup>157</sup> This bias is exacerbated through media coverage focusing its attention on the woes of homosexual white males,<sup>158</sup> despite the fact that the people most often targeted for discrimination are ethnic minorities.<sup>159</sup>

In terms of legislation, the Hate Crime Prevention Act was enacted, in part, in response to the beating of a young homosexual teenager, Matthew

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<sup>155</sup> See QUEER (IN)JUSTICE, *supra* note 3, at xvii (“[LGBTQ rights groups] have been dominated by white, middle-class leadership and membership, and have also relied heavily on financial support of affluent, white gays. As a result, their agendas tend to favor assimilation . . . over challenges to the systemic violence and oppressions it produces.”); see also WILLIAM N. ESKRIDGE, JR., GAYLAW 5 (1999) (“[G]aylegal struggles have been dominated by white middle-class male perspectives.”).

<sup>156</sup> See, e.g., Courtney M. Cahill, *Disgust and the Problematic Politics of Similarity*, 109 MICH. L. REV. 943, 956 (2011) (“[T]he more that gays look like straights, the more likely it is that those straights who are unsympathetic to the idea of same-sex marriage might be able to empathize . . .”); Nancy Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 544 (2009) (“The couples chosen as plaintiffs in marriage litigation, and others who are spokespersons for marriage equality, emphasize how much they resemble married heterosexual couples.”); Marc Spindelman, *Homosexuality’s Horizon*, 54 EMORY L.J. 1361, 1375, 1389 (2005) (identifying Massachusetts marriage equality opinion’s “like-straight” reasoning and its “assimilation of homosexuality to a heterosexualized marriage norm”).

<sup>157</sup> Darren L. Hutchinson, “Gay Rights” for “Gay Whites”? : *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1384 (2000) (arguing that “gay rights activists pursue white and upper-class political agendas”).

<sup>158</sup> For just one example, compare the amount of attention paid to the suicides of a privileged, white student, Tyler Clementi, and young minority, Carl Walker-Hoover. See Richard Pérez-Peña & Nate Schweber, *Roommate Is Arraigned in Rutgers Suicide Case*, N.Y. TIMES, May 24, 2011, at A22 (describing the highly-publicized suicide of a Rutgers University student that resulted from the taping and public posting of Clementi’s sexual encounter with another man); Chris Rohmann, *Stage Struck: Pesticide for Bullies*, VALLEY ADVOC. (May 20, 2010), <http://www.valleyadvocate.com/article.cfm?aid=11785> (describing the suicide of eleven-year-old African-American boy, who was bullied because he was perceived to be gay, and whose tragic death “provoked far less media attention and community soul-searching than” the highly-publicized suicide of Phoebe Prince, who was taunted because of an opposite-sex love triangle).

<sup>159</sup> QUEER (IN)JUSTICE, *supra* note 3, at 59. For a more detailed recount of examples of the policing of LGBTQ minorities, see Stonewalled, *supra* note 64, at 26-29.

Shepard, which ultimately resulted in the young man's death.<sup>160</sup> At the time of Matthew Shepard's death, there was no law in place that made it a hate crime to injure someone due to sexual orientation.<sup>161</sup> In enacting the Hate Crime Prevention Act, Congress intended to expand the existing hate crime legislation to apply to discrimination based on "gender, sexual orientation, gender identity, or disability."<sup>162</sup> Congress specifically stated that "expanding the circumstances under which certain hate crimes can be prosecuted" will "criminalize instances of vicious bias-motivated crimes that presently fall outside the reaches of the Federal criminal laws."<sup>163</sup> However, this statute, while effective in theory, has never once been applied to the conduct of a police officer.<sup>164</sup>

Following the history of the Gay Rights movement, the unfortunate reality becomes apparent that, even though the Gay Rights Movement's focus is necessarily on equality, there still exists inherent bias, including sexism and racism that prevents the movement from being completely true to its ultimate purpose.<sup>165</sup> Although some great progress has been made since the start of the Gay Rights Movement, in order to achieve true equality, more work is needed to focus on the rights of all LGBTQ persons, not just those privileged, white males already receiving public recognition.

#### *E. Stage 5: Bargaining - Recommendations*

##### 1. Revise and/or Clarify Current Anti-Discrimination Legislation

As noted above, the Hate Crime Prevention Act has never been applied to the conduct of an on-duty police officer. However, even theoretical application of the Hate Crime Prevention Act to the actions of on-duty law enforcement personnel poses unique issues. One such issue arises in the use of the phrase "because of" in the statute.<sup>166</sup> Circuit courts are currently

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<sup>160</sup> See David Jackson, *Obama signs hate-crime law rooted in crimes of 1998*, USA TODAY (Oct. 28, 2009), [http://content.usatoday.com/communities/theoval/post/2009/10/620000629/1#.WFdnH\\_krK00](http://content.usatoday.com/communities/theoval/post/2009/10/620000629/1#.WFdnH_krK00),

<sup>161</sup> See 18 U.S.C. § 245, the hate crime legislation enacted at the time Matthew Shepard was beaten and killed.

<sup>162</sup> Compare 18 U.S.C. § 245 with 18 U.S.C. § 249.

<sup>163</sup> See H.R. Rep. No. 86, Pt. 1, 111th Cong., 1st Sess. 5 (2009).

<sup>164</sup> For a more detailed discussion of the pitfalls associated with the current language of the Hate Crime Prevention Act, see *infra* Section III.E.

<sup>165</sup> See, e.g., Kristine E. Newhall & Erin E. Buzuvis, (*e*)*Racing Jennifer Harris: Sexuality and Race, Law and Discourse in Harris v. Portland*, 32 J. SPORT & SOC. ISSUES 345 (2008) (describing how both homophobia and racism played a role in discrimination against a Penn State basketball player).

<sup>166</sup> See 18 U.S.C. § 249.



split on whether the phrase “because of” in the Hate Crime Prevention Act should be interpreted as a “but-for” test or a “substantial motivating factor” test.<sup>167</sup>

If the phrase “because of” in the Hate Crime Prevention Act is interpreted to mean a “but-for” test, it could arguably never be applied to an on-duty police officer, whose duty to “protect and serve” would almost always be a partial motivation for their actions.<sup>168</sup> Although this issue has not been decided by the Supreme Court in the context of the Hate Crime Prevention Act, it is still troubling because “but-for” was found by the Supreme Court to be the proper interpretation of “because of” in several other federal statutes.<sup>169</sup> If the Supreme Court continues to interpret “because of” to mean “but-for,” it is unlikely that the current hate crime legislation could ever be successfully applied to the actions of a police officer.

In order to rectify this problem, the Hate Crime Prevention Act should be amended—or supplemented—with language that specifically makes it a crime for on-duty law enforcement officers to cause injury to another person motivated by that person’s gender, sexual orientation, or gender identity. If such language were to be added to the federal statutes, officers would at least be on notice that such discriminatory conduct will not be tolerated and would likely put more thought into the potential consequences of their actions before they discriminate against LGBTQ persons or would refrain from such discriminatory conduct.

On the state level, similar legislation can be enacted or modified to ensure that this discrimination is lessened nationwide. Over half of all states do not currently have legislation enacted which expressly bans

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<sup>167</sup> Compare *United States v. Miller*, 767 F.3d 585, 589 (6th Cir. 2014) (interpreting the “because of” to mean but-for causation), with *United States v. Maybee*, 687 F.3d 1026, 1029 (8th Cir. 2012) (holding that a “substantial motivating factor” interpretation of “because of” is more analogous with congressional intent).

<sup>168</sup> It is worth noting that even under a lesser “substantial motivating factor” test, it may still prove difficult to apply the Hate Crime Prevention Act to the actions of an on-duty police officer, who may also argue that the “substantial motivating factor” in their actions is public safety.

<sup>169</sup> See, e.g., *United States v. Burrage*, 134 S.Ct. 881 (2014) (finding a “but-for” interpretation appropriate in regards to drug crimes); *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (2013) (finding a “but-for” interpretation appropriate in regards to a Title VII retaliation claim). The use of the phrase “because of” can be contrasted with the terms used in other statutes for parallel conduct, such as the phrase “motivated by.” See, e.g., 42 U.S.C. § 13981 (a part of the Violence Against Women Act of 1994 defining “crime of violence motivated by gender” as “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender”).

discrimination based on gender identity or sexual orientation.<sup>170</sup> Further, the states with anti-sodomy or similar laws still in effect should repeal, or at least revise its statutory language to reduce the disparate use and effect these inherently discriminatory statutes have on the LGBTQ community.<sup>171</sup> Even if federal protections are not enhanced, enacting statutes in the states that do not currently offer these protections could help provide for LGBTQ safety and equality across the nation. Such statutes could be written to be comprehensive, expressly including discriminatory conduct by law enforcement officers and members of the judiciary that result in the inequitable administration of justice. Prohibiting this conduct would provide similar notice as the Hate Crime Prevention Act recommendations above, and would likely reduce discrimination and harassment of LGBTQ persons.

## 2. Enhance Law Enforcement Training

Thorough and consistent training of police officers, court officials, and prison personnel on sexual orientation and gender identity is essential in limiting the discriminatory and harassing conduct against LGBTQ persons. With adequate trainings in place, law enforcement would likely be able to better understand, tolerate, and respect members of the LGBTQ community. By making these trainings on diversity and tolerance mandatory and implementing them early on in the training process, the likelihood of police officers, prison guards, and others victimizing or failing to empathize with LGBTQ victims can be diminished. This type of training should occur every few years to best reflect the societal landscape as our acceptance and views evolve. Some police departments have already begun to successfully implement such trainings,<sup>172</sup> but they should be implemented nationwide to ensure congruency and fair treatment of the LGBTQ community across the board.

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<sup>170</sup> Specifically, twenty-nine states do not ban discrimination based on sexual orientation and thirty-two states do not ban discrimination based on gender identity in state legislation. *See State Non-Discrimination Laws in the U.S.*, NAT'L GAY AND LESBIAN TASK FORCE, [http://www.thetaskforce.org/static\\_html/downloads/reports/issue\\_maps/non\\_discrimination\\_5\\_14\\_color\\_new.pdf](http://www.thetaskforce.org/static_html/downloads/reports/issue_maps/non_discrimination_5_14_color_new.pdf) (last visited Aug. 22, 2016).

<sup>171</sup> For a more detailed discussion on the current state of anti-sodomy laws, *see supra* Section III.A.

<sup>172</sup> Take, for example, the Jersey City Police Department, which implemented LGBTQ trainings in connection with the NYPD. *Jersey City Continues Groundbreaking LGBT Training for New JCPD Officers with Training for Next Class of Graduates*, CITY OF JERSEY, OFFICE OF THE MAYOR (June 8, 2016), <http://www.cityofjerseycity.com/uploadedFiles/GOALny%20LGBT%20training%20press%20release.pdf>.

### 3. Develop More Adequate Channels for Citizen Complaints

As mentioned above, many LGBTQ victims are unlikely to file complaints against police for improper conduct and a recent study has shown that most of those who do actually file complaints can feel like their problems are not fully addressed.<sup>173</sup> Out of over 2,000 respondents to this survey, approximately ten percent reported that they had filed a complaint regarding their treatment by the police within the five years prior to the survey.<sup>174</sup> Of those who did file a complaint, almost three-quarters of them felt that their complaint was not fully or properly addressed.<sup>175</sup> The authors of the report on this survey note that a “community-based complaint mechanism,” such as New York’s “Civilian Complaint Review Board,” could be beneficial to providing a safe environment for those who feel the need to make a complaint about police misconduct and to ensure that no retaliation will be sought against the complainants.<sup>176</sup>

Additionally, because these citizen complaint boards would be run by members of the community, and not the police force, the board would not need to report police officials, can hold officers to a higher standard, and demand accountability on behalf of the community. By having such a process run by other members of the community, and not by police departments themselves, LGBTQ victims of police discrimination and harassment are more likely to have their voices heard and their complaints fully addressed. Citizen complaint review boards could also be instrumental in connecting LGBTQ persons with the community in a meaningful way that allows for greater understanding of their problems and could result in more people becoming aware of and involved in the fight for LGBTQ equality. Several cities have instituted such review boards,<sup>177</sup> but making this type of process available to LGBTQ victims of harassment across the country would better benefit the LGBTQ community.

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<sup>173</sup> See *Protected and Served?*, LAMBDA LEGAL, <http://www.lambdalegal.org/protected-and-served/police> (last visited Aug. 10, 2016).

<sup>174</sup> See *id.* In total, 205 respondents reported filing a complaint. *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*; see also *Civilian Complaint Review Board*, NYC.GOV, <http://www1.nyc.gov/site/ccrb/index.page> (last visited Aug. 12, 2016).

<sup>177</sup> See, e.g., *Citizen Investigative Panel*, MIAMIGOV.COM, <http://www.miamigov.com/cip> (last visited Nov. 15, 2016); *Atlanta Citizen Review Board*, ACRBGOV.ORG, <http://www.acrbgov.org> (last visited Nov. 15, 2016); *Citizens’ Law Enforcement Review Board*, SANDIEGOCOUNTY.GOV, <http://www.sandiegocounty.gov/clerb> (last visited Nov. 15, 2015).

#### 4. Increase Data Collection on Discriminatory Police Practices

As society becomes increasingly accepting of the LGBTQ community, naturally the information we will have at our disposal to view trends in discrimination will grow. However, in order for greater acceptance of the LGBTQ community to occur, it is equally important that their plight is understood. Because of the reluctance by LGBTQ victims to report the crimes and discrimination that they are victims of,<sup>178</sup> it is currently difficult to obtain a complete picture of the scope and scale of the discrimination problem.

While there are currently federal administrative agencies that conduct surveys on victims of crimes and on police interactions, these surveys do not always have questions that determine the sexual orientation or gender identity of the respondent.<sup>179</sup> Even if the victims feel that they were discriminated against, unless directly asked about these categories in the demographics section of the surveys, they may be reluctant to volunteer the information in fear of subjecting themselves to further harassment and discrimination.<sup>180</sup> By instituting policies and procedures to collect more information about the victims of targeting, harassment, and discrimination within the criminal justice system, we will be able to form a more complete picture about who the victims are, where such discriminatory practices may be concentrated, and what measures will best serve to limit the problems.

#### 5. Implement and Enforce Internal Non-Discrimination Policies

In addition to outside mechanisms such as citizen complaint review boards, both state and local governments should enact internal policies and procedures to combat and prevent LGBTQ discrimination and harassment by officers. By establishing their own policies and being able to self-govern, police forces may take the time to carefully consider how certain actions are perceived by the LGBTQ persons with whom they may interact. This in itself may work as a type of sensitivity training for the

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<sup>178</sup> For a more complete discussion on the underreporting problem, *see supra* Section III.B.

<sup>179</sup> Some examples of these types of data-collection efforts are available from the Bureau of Justice Statistics, at <http://www.bjs.gov/index.cfm?ty=dca> (last visited Sept. 12, 2016). Relevant surveys may include, without limitation, the National Crime Victimization Survey, National Former Prisoner Survey, Police-Public Contact Survey, and Survey of Sexual Victimization.

<sup>180</sup> The institution of citizen complaint review boards, as mentioned above, would be helpful in limiting many of these problems and would likely result in more complete and unbiased statistics on the discrimination and harassment of LGBTQ persons.

officers who are tasked with determining the limits and penalties for different offending conduct by officers. Additionally, since the policies themselves will have been determined and established by law enforcement personnel, there is a better likelihood of the policies being understood and adhered to by fellow officers.

Similarly to the other efforts already mentioned, several police departments have begun to make strides in this area and have enacted such policies.<sup>181</sup> These internal policies govern a range of biased-based conduct including sanctions for profiling, discriminating, and harassing based on gender identity and sexual orientation, rules for interacting with members of the LGBTQ community, and how to ensure the safety of LGBTQ persons when booking them into jail.<sup>182</sup>

Further efforts in this area have also been made on the federal level through the enactment of the Prison Rape Elimination Act (“PREA”).<sup>183</sup> The PREA not only defines what it means to be “transgender,” but offers specific guidelines for handling the searching of transgender inmates. For example, the PREA National Standards specifically prohibit “search[ing] or physically examin[ing] a transgender or intersex detainee for the sole purpose of determining the detainee’s genital status.”<sup>184</sup> They further provide that “[t]he agency shall train law enforcement staff in how to conduct cross-gender pat-down searches, and the searches of transgender and intersex detainees, in a professional and respectful manner . . . .”<sup>185</sup> By implementing the same type of LGBTQ-aware standards throughout both local and federal law enforcement departments and agencies, officer conduct can be better monitored and discriminatory actions can be punished appropriately.

#### IV. CONCLUSION

Research indicates that the LGBTQ community faces discrimination, harassment, and improper profiling through all stages of our criminal justice system. While there have been strides towards equality over the last

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<sup>181</sup> See, e.g., Amber White, *LGBTQIA: Directive 152 and Ending Discrimination Against the Trans Community*, PHILADELPHIA NEIGHBORHOODS (Apr. 28, 2014), <https://philadelphianeighborhoods.com/2014/04/28/lgbtqia-directive-152-and-ending-discrimination-against-the-trans-community/>; see also *Boston Police Department Issues Special Order for Interacting with Transgender Individuals*, BPDNEWS.COM (June 11, 2013), <http://bpdnews.com/news/2013/6/11/boston-police-department-issues-special-order-for-interacting-with-transgender-individuals>.

<sup>182</sup> See, e.g., *id.*

<sup>183</sup> 42 U.S.C. § 15601, *et seq.*

<sup>184</sup> See *Prison Rape Elimination Act National Standards*, 28 C.F.R. § 115.115(d).

<sup>185</sup> See *id.*, at § 115.115(e).

several decades, there are still many discriminatory laws in place as well as discriminatory practices occurring nationwide. The recommendations outlined above would help to solidify LGBTQ rights and prevent this inequitable administration of justice from continuing in the way it has. By removing—or even limiting—discriminatory practices based on sexual orientation or gender identity, LGBTQ persons would be better shielded from harassment. Such a shield could be a proverbial stepping stone that helps pave the way toward true equality.